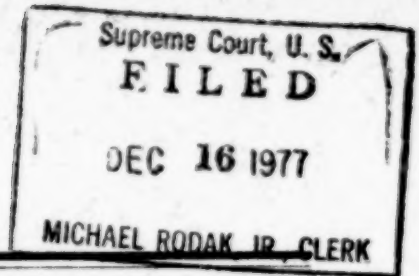


No. 77-599



In the Supreme Court of the United States

OCTOBER TERM, 1977

**PARKHILL-GOODLOE COMPANY, INC., and
THE HOME INSURANCE COMPANY, PETITIONERS**

v.

RUDOLPH McINTOSH, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT**

**BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION**

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OPINIONS BELOW

The court of appeals did not write an opinion. The opinion of the Benefits Review Board (Pet. App. 3a-13a) is reported at 4 BRBS 3. The opinion of the administrative law judge (Pet. App. 22a-33a) and his supplemental decision (Pet. App. 15a-22a) are reported in summary form at 2 BRBS (ALJ) 236 and 3 BRBS (ALJ) 59.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1977. A petition for rehearing was denied on May 31, 1977 (Pet. App. 2a-3a). On July 29, 1977, Mr. Justice Powell extended the time within which to file a petition

for a writ of certiorari to and including October 28, 1977. The petition for a writ of certiorari was filed on October 25, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the finding of the administrative law judge that respondent McIntosh was not a "master or member of a crew of any vessel."

STATUTES INVOLVED

Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1425, as amended, 86 Stat. 1251, 33 U.S.C. (Supp. V) 902(3), provides in relevant part:

The term "employee" means any person engaged in maritime employment, * * * but such term does not include a master or member of a crew of any vessel, * * *.

Section 3(a) of the Act, 44 Stat. 1426, as amended, 86 Stat. 1251, 33 U.S.C. (Supp. V) 903(a), provides in relevant part:

* * * No compensation shall be payable in respect of the disability or death of—(1) A master or member of a crew of any vessel, * * *.

STATEMENT

On February 12, 1975, respondent Rudolph McIntosh sustained serious, permanently disabling injuries in the course of his employment for petitioner Parkhill-Goodloe Co.¹ The injury occurred while McIntosh was working on

¹The facts of this case are summarized by the Benefits Review Board (Pet. App. 4a-5a) and the administrative law judge (*id.* at 25a-27a).

a barge afloat on Tom's Creek, a cut of the Altamaha River, in Georgia. The barge, attached to the tug *Little Ed* and accompanied by a "runboat" or outboard "skiff," was engaged in removing trees, logs, and other obstructions to navigation in Tom's Creek.

McIntosh had worked for Parkhill-Goodloe Co. for approximately ten years. He had neither a master's license nor seaman's papers, although he was licensed to operate the runboat. He was the supervisor of the Tom's Creek operations. He met the tug, barge, and runboat on the fourth day of their five-day trip up the River to the work site. During the week-long project, McIntosh, together with the men who had traveled up the River by boat—a tug operator, a crane operator, a boatman, and a deckhand—worked eight to ten hours a day, returning each afternoon in the runboat to a landing. They slept in a local motel, and they ate breakfast and dinner ashore.

McIntosh directed the clearing operations from the deck of the barge. He gave hand signals to the tug operator to maneuver the dragline barge into position for the removal of each obstruction, and he supervised the activities of the other workers. The crew uprooted a large oak tree, which gave way and swung aboard; McIntosh jumped down from a pile of logs on the deck, slipped, and fell; the tree struck and dislodged one of the logs, which rolled onto McIntosh, crushing his chest and back. He will be confined to a wheelchair for the rest of his life.

McIntosh filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act. Petitioners contended that he was a "master or member of a crew of [a] vessel" and consequently was excluded from the protection of the Act by Sections 2(3) and 3(a)(1). The administrative law judge rejected this contention, concluding that at the time of the injury McIntosh "was

primarily engaged in an activity normally associated with heavy construction work, *i.e.*, the uprooting, by crane, of a large tree" (Pet. App. 30a). He explained that McIntosh's supervision and direction by hand signals to the tug pilot were merely "incidental" to the removal of obstructions (*ibid.*). He further found that the barge was not "in navigation" during the uprooting of the oak tree (*ibid.*). He awarded McIntosh compensation under the Act for permanent total disability (*id.* at 30a-31a), and he adhered to this determination after a petition for reconsideration (*id.* at 15a-20a).²

The Benefits Review Board held that the administrative law judge erred in finding that the barge was not "in navigation," but it concluded that the finding that McIntosh was not a master or member of the barge's or tug's crew was supported by substantial evidence (Pet. App. 6a-8a). It affirmed the administrative law judge's award in all respects, and the court of appeals affirmed, in turn, without opinion (Pet. App. 1a-2a).

ARGUMENT

In cases under the Jones Act, 41 Stat. 1007, 46 U.S.C. 688, the question whether a person is a "seaman" or a "member of a crew" is a factual issue on which juries have considerable discretion. *Gianfala v. Texas Co.*, 350 U.S. 879; *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370; *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252; *Butler v. Whiteman*, 356 U.S. 271. It seems likely that a jury could have found in McIntosh's favor if he had

²The administrative law judge's "Supplemental Decision and Order" did not, as petitioners state (Pet. 3), "revok[e] in its entirety the original Decision and Order." It revoked only the original order and reentered a clarified order. See Pet. App. 19a. The original decision was not altered.

chosen to forswear his workers' compensation remedy and had brought suit, under the Jones Act, claiming to be a seaman.

McIntosh was engaged in activity that had both marine and non-marine aspects. The barge was a special-purpose vessel that was essentially a work platform rather than a means of transportation by water. Its crew may be found to be members of the crew of a vessel, despite the facts that they have no seaman's papers, eat and sleep ashore, are paid by the hour, do not travel with the vessel from place to place when it is moved by power not its own, and are aboard only for a single project in a single place. But the law does not compel the factfinder to reach this conclusion in every case.

The Longshoremen's Act claimant's status as a crew member generally turns on questions of fact within the conclusive authority of the administrative factfinder, so long as his decision is supported by substantial evidence. *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251. The term "member of a crew * * * does not have an absolutely unvarying legal significance" (309 U.S. at 258).

We do not say that the factfinder can decide any case as he pleases. *Norton v. Warner Co.*, 321 U.S. 565, on which petitioners heavily rely, held that he may not. But as *Senko* establishes, the factfinder's decision—necessarily resting on particular facts and inferences concerning each particular operation—is entitled to considerable respect. Reviewing courts do not substitute their judgments for that of the agency on the "application of a broad statutory term or phrase to a specific set of facts," even when the question is "more legal than factual in nature" and the basic facts are undisputed, so long as the administrative finding in the individual case has a "reasonable legal basis." *Cardillo v. Liberty Mutual*

Insurance Co., 330 U.S. 469, 478-479. See also *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507-508.

The Benefits Review Board fully considered petitioners' contentions on the extensive factual record and determined that one of the administrative law judge's subsidiary determinations—that the dragline barge was not “in navigation” at the time of respondent McIntosh's injury—was contrary to established principles of law. It found substantial evidentiary support and a reasonable legal basis, however, for the finding that McIntosh did not have all the attributes of a master or member of a vessel's crew.³ The court of appeals concurred, and there is no reason for this Court to review the essentially factual decision on which three lower tribunals have agreed.⁴

³The Board's review of factual decisions of administrative law judges is limited to determining whether their findings are supported by “substantial evidence.” 86 Stat. 1261, 33 U.S.C. (Supp. V) 921(b)(3).

⁴There is no conflict among the circuits concerning the controlling legal standard. This standard has been established in the cases discussed in the text, and the Fifth Circuit on several occasions has applied it to hold that a particular claimant was a seaman. See, e.g., *Higginbotham v. Mobil Oil Corp.*, 545 F. 2d 422 (C.A. 5); *Boatel, Inc. v. Delamore*, 379 F. 2d 850 (C.A. 5). No court of appeals has adopted a legal standard different from that of *Higginbotham* and *Boatel* under which a person is *more* likely to be found to be a seaman. But because each case turns on its facts, those cases do not control here. Even if they did, the present case would establish at most an intra-circuit conflict that does not require review by this Court. *Wisniewski v. United States*, 353 U.S. 901, 902.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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